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No. 06-1190

In the Supreme Court of the United States

Amy G. and G. G.,
Petitioners,
v.
M. W.,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal Second District, Division Three

REPLY TO BRIEF IN OPPOSITION

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I. No independent state grounds support California's gender-stereotyped double standard for conferring "parent" and "stepparent" legal status.

Amy G. and G.G.'s Petition asks whether California's use of gender-stereotypes to justify different standards for maternity and paternity cases can survive federal equal-protection, due-process, and family-privacy guarantees.

M.W.'s Opposition labels the California appellate court's unconstitutional construction of the state's parentage statutes "independent state grounds." There are no independent state grounds.

When state courts construe their laws using gender stereotypes to justify different legal standards for determining who has a constitutionally-protected legal status and who does not, those laws present a federal constitutional question.

State parentage laws determine who is a parent, who is a stepparent, and who is a nonparent. Parents have constitutionally protected rights to the care and custody of their children. Stepparents and nonparents do not have those constitutionally-protected rights. *Troxel v. Granville*, 530 U.S. 57 (U.S. 2000) Consequently, all state laws governing who enjoys the federal constitutionally-protected status of parenthood are subject to rigorous federal constitutional scrutiny.

California uses different rules to decide whether a man is a child's father or a child's stepfather than it uses to decide whether a woman is a child's mother or a child's stepmother. If California applied the same legal standard to M.W. and Amy G. that it applies in paternity cases, Amy G. would be recognized in law as the child's mother. M.W. conceived a child with a married man, never supported the child, and failed to fully commit to all of the responsibilities of parenthood at the earliest opportunity. Amy G. is married to the child's father, is the mother of

the child's siblings, supports the child, and has the strongest psychological bond with him.

California's "... paternity presumptions are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family." *In re Jesusa V.* 32 Cal.4th 588, 615 (Cal. 2004); *Elisa B. v. Super. Ct. (Emily B.)* 37 Cal.4th 108, 121 (Cal. 2005), both California opinions quoting the California Court of Appeal opinion in *In re Salvador M.* 111 Cal.App.4th 1353, 1357-1358 (Cal. 2003).

Substitution of gender-stereotypes for individualized determinations produced an outcome that defeats, rather than serves, the statutory scheme's purposes. In this fact-pattern and others, California gives biological mothers full parental rights when their conduct is identical to that of biological fathers who have no parental rights under California law.

The court of appeal decision contains no "stand-alone," constitutional state grounds. California's parentage double standard is founded upon gender stereotypes. The appellate court concluded that gestation and childbirth create the strongest psychological bonds, and the greatest commitment to motherhood. By contrast, California law looks skeptically at biological fathers, consistently holding them to far higher standards to demonstrate commitment to fatherhood and psychological bonds with the child.

M.W.'s Opposition avoids comparing the way California law treats paternity with the way California law treats maternity. M.W. never addresses the pervasive, gender-based double standards of California parentage law.

But for California's presumed-father laws, men that California recognizes as fathers would be only stepfathers. The federal constitution requires that California apply the same criteria when deciding who the law treats as a mother and who the law treats as a stepmother.

Because California law substitutes sex-based stereotypes about birth mothers' innate commitment to

mothering for the individualized determinations it uses to compare the conduct of competing putative fathers, California law violates the equal-protection, due-process and family-privacy guarantees of the federal constitution.

II. Whether men and women are similarly-situated in parentage actions is a federal constitutional question, not an independent state ground; California can't avoid constitutional scrutiny by using gender stereotypes to label equality "impracticable."

There is no *nexus* between the purpose of the parentage statutes (family integrity and children's welfare) and parental. Hence mothers and fathers must be recognized under the same set of rules -- they are similarly-situated for the purposes of defining who holds the legal status of parent. Men and women have equal rights to raise children. Men and women have equal duties to pay support.

A state may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose. *Lehr v. Robertson* 463 U.S. 248, 265 (U.S.1983) California's differential treatment of men and women produces results that defeat the purposes of the statutory scheme – protection of family integrity and children's established relationships.

If recognition of M.W. as the mother here served those purposes, M.W. would not need to rely on a double standard. Although M.W. fails to compare the way parentage law treats motherhood with the way it treats fatherhood, that difference is what makes the law unconstitutional. M.W. could not meet the standards that the law requires of biological fathers.

Even when a biological father demonstrates a full commitment to parenthood at the stage of the child's life

when M.W. chose the opposite course, California law can either deny him standing *(Dawn D. v. Super. Ct. (Jerry K.)* 17 Cal.4th 932 (Cal. 1998)), or compare and contrast him to the mother's husband *(Craig L. v. Sandy S.*, 125 Cal. App.4th 36 (Cal. 2004)).

M.W. correctly notes that one way of establishing maternity under California law is by proof of giving birth. Cal. Fam. Code §7610. California law also permits evidence of biological fatherhood to establish paternity. Cal. Fam. Code §7550 *et seq.* M.W. argues that because only women can give birth, application of the statute to bar Amy's claim survives equal-protection scrutiny.

She misses the point. The issue before this Court is not application of the statutory gender-neutral mandate of Cal. Fam. Code §7650. The issue here is whether application of that statute to trump the parentage presumptions or facilitate adoption by nonparents is narrowly tailored to serve the underlying purposes of the state's parentage laws.

Neither statute permitting biological evidence to establish parentage mandates a finding that the biological parent must be recognized as the legal parent. For example, California's Supreme Court refused to apply §7610 to establish the maternity of a gestational surrogate who had given birth, over the claims of the father and his wife who had retained the services of the surrogate. *Johnson v. Calvert*, 5 Cal.4th 8 (Cal. 1993) Similarly, California's presumed-father cases have long been held to trump its blood-test act. *Kusior v. Silver*, 54 Cal.2d 603 (Cal.1960)

California law may use gender-based methods to identify biological parents. Men and women differ biologically. Once the child is born, those biological differences are no longer legally cognizable, where the policy of the law is family integrity and child welfare. When conferring parental rights, the state may not prefer biological mothers over presumed mothers, unless it also prefers biological fathers over presumed fathers.

By construing §7610 as dispositive of maternity, the *Amy G.* opinion establishes unconstitutional, gender-based discrimination. California may not legislate a birth-mother exception to its otherwise gender-neutral (Cal. Fam. Code §7650) presumed-father laws. No matter what the rationale, California must either base parentage strictly on biology, or subject men and women to the same case-by-case weighing process.

The federal constitution does not permit a state to justify differential treatment of men and women when deciding who is a parent and who is a stepparent just by labeling equality "impracticable." This Court should compare the legal standards governing men with those governing women in parentage cases and decide whether gender differences are sufficiently tied to the state's purposes. M.W.'s Opposition avoids looking at the policies that animate the parentage statutes, because those policies point to equal treatment of men and women.

III. Because biology doesn't determine paternity in many states, the gender-based double standard affects children and families across the nation; women have raised their husband's children as their own since the days of Sarah, Abraham and Hagar.

M.W. tries to limit the scope of the issues in this case to the particulars of California law. But California's statutory scheme is not unique – gender discrimination is pervasive in parentage and custody cases. This Court should decide whether states must view motherhood and fatherhood through identical legal lenses.

California, like many other states, has adopted a variant of the Uniform Parentage Act. Many UPA states confer parental status on biologically-unrelated men, despite the claims of a biological father, as California's Supreme Court notes,

Moreover, other states that have adopted the UPA have consistently declined to make biology determinative under their analogs to section 7612 when confronted by competing presumptions of paternity. In *N.A.H. v. S.L.S.* (Colo. 2000) 9 P.3d 354, for example, the Colorado Supreme Court found that "neither the presumption of legitimacy nor the presumption based on biology is conclusive" (id. at p. 362) and held instead "that when presumptions of paternity arise in more than one potential father, trial courts must take the best interests of the child into account as part of policy and logic in resolving competing presumptions." (Id. at p. 366.) In *Doe v. Doe*, *supra*, 52 P.3d 255, the Hawai'i Supreme Court similarly found that "the genetic testing presumption is not more important than the other presumptions; it is one of several that must be considered . . . ." (Id. at p. 262.) In *Witso v. Overby* (Minn. 2001) 627 N.W.2d 63, the Minnesota Supreme Court declared that even if genetic tests identified one man as the biological father, the court must nonetheless "weigh the conflicting presumptions, and 'the presumption which on the facts is founded on the weightier considerations of policy and logic controls.'" (Id. at p. 69; *Matter of Welfare of C.M.G.* (Minn.Ct.App. 1994) 516 N.W. 2d 555, 560 ["Where competing presumptions of paternity exists, the determination of paternity is no longer solely an issue of biological fact"].) And, in *Love v. Love* (1998) 114 Nev. 572 [959 P.2d 523, 527], where only the husband's presumption was at issue and he sought to disclaim paternity on the ground he was not the biological father, the Nevada Supreme Court observed that "where factors conflict, as they may here, the district court must use its discretion to apply considerations of policy and logic to the relevant evidence." In short, our construction – which permits a court to consider every relevant

consideration of policy and logic – is in accord with every UPA state to have addressed the issue. [Fn]

In re Jesusa V., supra, 32 Cal.4th at 608

Every state that permits recognition of biologically-unrelated men as fathers must face the question of whether the same legal standards govern when biologically-unrelated women claim parentage.

The facts of this case are far from unique. Women have raised their husbands' extramarital children as their own since the time of the Old Testament. According to Genesis, Sarah and Abraham raised Ishmael (Abraham's extramarital son born to Sarah's maid, Hagar) with their son Isaac. Both boys grew up as children of Abraham's marriage to Sarah.

The decision here can only stand if a state's use of gender stereotypes to justify different treatment of men and women in parentage cases meets federal constitutional standards. If it does not, there can be no independent state grounds – the grounds set forth in the decision apply the parentage statutes differently based solely on gender.

IV. California's double standard fails to serve stated purposes; cannot withstand constitutional scrutiny.

In arguing that this Court should deny the Petition, M.W. focuses on the California cases involving motherhood. That focus sends the Court after a MacGuffin – the real flaws in the link between biological determinism and social policy show up when one compares how California applies the presumed-father laws in paternity cases to the way it handles maternity cases. M.W. avoids that comparison, and fails to show that there is a sufficient link between gender and the purpose of the statutes.

California assumes that pregnancy makes women committed mothers, while testing each putative father's

commitment to parenthood through close examination of his course of conduct with respect to the child and its mother. Thus California substitutes stereotypes about the psychological bonds arising from pregnancy and childbirth for individualized determinations in parentage cases – favoring birth mothers who fail to *fully* assume parental responsibilities at the earliest opportunity, while applying a dramatically different standard in paternity cases.

Application of those stereotypes defeats the purposes of the statutory scheme in this case and in other recurring fact patterns. The result here does not protect the child's established family relationships, give him the protection of the marital family, or protect him from the stigma of illegitimacy. If the Court had applied the legal standard it uses to distinguish between fathers and stepfathers, that standard would have served all three legislative policies.

The task at hand entails comparing how California treats women with how it treats men. That means looking hard at conduct, rather than reaching for shocking language to characterize the outcome, or paint M.W. as a passive victim.

For example, M.W. argues that recognizing Amy as the mother, is tantamount to making M.W. an involuntary surrogate. That argument has two flaws. First, one could equally argue that recognizing Gerald D. as the father in *Michael H. v. Gerald D.*, 491 U.S. 110 (U.S. 1989) made Michael H., who developed a psychological father-daughter relationship with Victoria, Gerald's sperm donor. Second, M.W. knowingly conceived a child with a married man. M.W. knowingly turned that child over to his father and his father's wife to raise, and later changed her mind. M.W.'s choices and conduct contributed to the situation that enables Amy to assert presumed-mother status.

California appellate decisions in paternity cases illustrate the disconnect between California's gender-discriminatory application of the presumed-father statutes and the purposes of the statutory scheme.

California's appellate courts have held that a biological father's presumed-father status depends on promptness and the extent of his "full" commitment to assuming parental responsibilities.

Biological fathers (even though they cannot know whether the child is their genetic offspring until after birth) must come forward as soon as they learn of the mother's pregnancy, and assume full parental responsibilities. *Adoption of Kelsey S.*, 1 Cal.4th 816 (Cal. 1992); *Adoption of Michael H.*, 10 Cal.4th 1043 (Cal.1995) Even men who do everything they can when they learn of the pregnancy, can be barred from challenging a maritally-presumed father under *Dawn D. v. Super. Ct. (Jerry K.), supra,* 17 Cal.4th 932.

Application of those holdings in *In re Elijah V.* 127 Cal.App.4th 576 (Cal.2005) resulted in recognition of the mother's husband, not the biological father, as the child's legal father, where the biological father's actual course of conduct closely paralleled M.W.'s course of conduct. Similarly, a biological father whose childrearing involvement and commitment was greater than M.W.'s could not attain legal-father status in *In re Sarah C.*, 8 Cal.App.4th 964, (Cal.1992).

The pervasive gender bias in California parentage law also arises in the context of consent to adoption. Last week California's Court of Appeal decided *In re Adoption of Arthur M.*, --- Cal.App.4th ---, 2007 WL 1056317 (Cal. 2007), a case involving unmarried high school students who conceived a child. The recognized the parental rights of the mother, although she spent the pregnancy making arrangements to divest herself of parental responsibilities by consenting to the maternal grandparents' independent adoption.

The Court held that the biological father did not have parental rights because he initially reacted to news of the pregnancy by "demanding" that the mother terminate the pregnancy, and failed to provide emotional and economic

support to her during the pregnancy. Although the father, despite uncertainty about his biological paternity, rose to the occasion before his son was born, brought a parentage action, and sought custody within two days after he learned of the birth, he did not win parental rights.

Clearly this allocation of parental rights cannot be supported by the notion that birth mothers are more committed to parental responsibilities and more bonded to their children than biological fathers.

California law makes biology determinative of paternity only in limited circumstances – when there is no competing presumed father. In other words, California law subordinates biological fatherhood to social fatherhood. By contrast, California ignores social motherhood when it occurs in the marital family. Since there is no gender-related difference between the child-rearing roles of mothers and fathers, and no difference between the economic support roles of mothers and father, gender cannot support this distinction.

There is no substantial link between the purposes of California's parentage statutes, as articulated by California's Supreme Court and appellate courts, and parental gender. Distinctions based on gender stereotypes produce results that undermine the purposes of the statutes, and preclude courts from acting in children's best interests. So long as California substitutes romantic stereotypes about maternity for case by case determinations, and fails to apply the same standards to men and women in parentage cases, California will deprive parents and children of the equal-protection, due-process and family-privacy protections of the federal constitution.